No. 92-1180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
JUN 11 1993
OFFICE OF THE CLERK

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JAMES DANIEL GOOD REAL PROPERTY, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF HAWAII IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE HISTORY OF FORFEITURE DOES NOT SUPPORT THE SEIZURE OF GOOD'S HOME WITHOUT A HEARING 3

II. SEIZURE OF GOOD'S HOME WITHOUT NOTICE AND A HEARING VIOLATED HIS RIGHT TO DUE PROCESS 10

A. Under The Fifth Amendment, Good Is Entitled To Notice And A Hearing Prior To Seizure Of His Home . . . 10

B. The Fourth Amendment Does Not Eviscerate The Fifth Amendment 13

1. The *Ex Parte* Procedures Of The Fourth Amendment Do Not Satisfy Due Process In The Civil Forfeiture Context 14

2. The Fourth Amendment Is Not Applicable To Seizures Of Real Property For Civil Forfeiture 15

Page

III. BECAUSE THE FORFEITURE OF GOOD'S HOME IS PUNITIVE IN BOTH PURPOSE AND EFFECT, DUE PROCESS DEMANDS THAT GOOD BE AFFORDED THE CONSTITUTIONAL PROTECTIONS TRADITIONALLY ASSOCIATED WITH THE IMPOSITION OF CRIMINAL SANCTIONS 19

A. The Distinction Between Civil *In Rem* Forfeiture And Criminal *In Personam* Forfeiture 19

B. The Forfeiture Of Good's Home Is Punitive 21

C. Given The Punitive Nature Of The Forfeiture Of His Home, Good Is Entitled To Procedural Protections Associated With The Imposition Of Criminal Sanctions 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Adams v. New York,
192 U.S. 585 (1904) 16

Boddie v. Connecticut,
401 U.S. 371 (1971) 10

Boyd v. United States,
116 U.S. 616 (1886) 16, 21, 22

Byars v. United States,
273 U.S. 28 (1927) 16

Cafeteria and Restaurant Workers Union v. McElroy,
367 U.S. 886 (1961) 3

Calero-Toledo v. Pearson Yacht Leasing Co.,
416 U.S. 663 (1974) 13, 23

Davis v. United States,
328 U.S. 582 (1946) 16

Dobbins's Distillery v. United States,
96 U.S. 395 (1878) 8

Fuentes v. Shevin,
407 U.S. 67 (1972) 2, 10, 11, 12

Garske v. United States,
1 F.2d 620 (8th Cir. 1924) 17

Gerstein v. Pugh,
420 U.S. 103 (1975) 14

Goldberg v. Kelly,
397 U.S. 254 (1970) 13

Page

Gouled v. United States,
255 U.S. 298 (1921) 16

In re Winship,
397 U.S. 358 (1970) 26

J. W. Goldsmith, Jr.-Grant Co. v. United States,
254 U.S. 505 (1921) 4, 5, 9

Joint Anti-Fascist Refugee Committee v. McGrath,
341 U.S. 123 (1951) 12

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 22

Mathews v. Eldridge,
424 U.S. 319 (1976) 2, 11

Mellet & Nichter Brewing Co. v. United States,
296 F. 765 (E.D.Pa. 1923) 18

Miller v. United States,
78 U.S. (11 Wall.) 268 (1871) 7, 8

Mitchell qui tam v. Torup,
Parker 227, 145 Eng.Rep. 764 (Ex. 1766) 6

Norris v. Doniphan,
61 Ky. (4 Met.) 385 (1863) 7

One 1958 Plymouth Sedan v. Pennsylvania,
380 U.S. 693 (1965) 15, 22

One Blue 1977 AMC Jeep CJ-5 v. United States,
783 F.2d 759 (8th Cir. 1986) 4

Smith v. United States,
__ U.S. __, 61 U.S.L.W. 4503 (June 1, 1993) 17

Page

Soldal v. Cook County,
506 U.S. __, 113 S.Ct. 538 (1992) 13

Sullivan v. Louisiana,
__ U.S. __, 61 U.S.L.W. 4518
(June 1, 1993) 26

The Palmyra,
25 U.S. (12 Wheat.) 1 (1827) 18

United States v. Brig Malek Adhel,
43 U.S. (2 How.) 210 (1844) 7

United States v. Certain Real Property And Premises Known As 38 Whalers Cove Drive,
954 F.2d 29 (2d Cir. 1992) 17

United States v. Halper,
490 U.S. 435 (1989) 21

United States v. Karo,
468 U.S. 705 (1984) 12

United States v. Loft on 6th Floor of Building,
182 F.Supp. 322 (S.D.N.Y. 1960) 17

United States v. One 1979 Porsche Coupe,
709 F.2d 1424 (11th Cir. 1983) 5

United States v. One Parcel of Real Estate Known As 916 Douglas Ave.,
903 F.2d 490 (7th Cir. 1990),
cert. denied, 498 U.S. 1126 (1991) 5

United States v. Parcel of Land, Bldgs., Appurtenances & Improv.,
507 U.S. __, 113 S.Ct. 1126 (1993) 16

United States v. Premises and Real Property at 4492 S. Livonia Rd., 889 F.2d 1258 (2d Cir. 1989) 11

United States v. Premises Known As 3639-2nd St., N.E., 869 F. 2d 1093 (8th Cir. 1989) 5

United States v. Reed, 572 F.2d 412 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978) 12

United States v. U.S. Coin & Currency, 401 U.S. 715 (1971) 4

Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) 15, 17, 18

Statutes, Rules and Regulations

21 U.S.C. §853 20

21 U.S.C. §881 ..... 1, 20, 21

§881(a)(7) 19, 23, 24

§881(b) 19

Confiscation Act, 12 Stat. 589 (1861) 7, 8

Fed.R.Crim.P. 41(b) 15

Legislative History

Cong. Globe, 37th Cong., 2d Sess. 1574 (1862) 7

S. Rep. No. 225, 98th Cong., 2d Sess. 195, *reprinted in* 1984 U.S. Code Cong & Admin. News 3182 23

Other Authorities

Comment, "Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason," 20 U.Chi.L.Rev. 319 (1953) 17

Day, L. Madison, THE CONSTITUTIONALITY AND LEGALITY OF CONFISCATIONS IN FEE, UNDER ACT OF JULY 17, 1862 (New Orleans 1870) 8

Finkelstein, Jacob J., "The Goring Ox: Some Historical Perspectives On Deodands, Forfeitures, Wrongful Death And The Western Notion Of Sovereignty," 46 Temp.L.Q. 169 (1973) 4, 5, 6

Hodgson, Sir Derek, PROFITS OF CRIME AND THEIR RECOVERY (Heinemann, London 1984) 4

Hyde, Walter Woodburn, "The Prosecution And Punishment Of Animals And Lifeless Things In The Middle Ages And Modern Times," 64 U.Pa.L.Rev. 696 (1916) 4, 5

Kaplan, John, "Search and Seizure: A No Man's Land In The Criminal Law," 49 Cal.L.Rev. 474 (1961) 16, 18

Kasten, Lawrence A., Note, "Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation," 60 Geo.Wash.L.Rev. 194 (1991) 8

Page

Maxeiner, James R.,
"Bane Of American Forfeiture
Law -- Banished At Last?",
62 Cornell L.Rev. 768 (1977) 5, 6, 7, 9, 23

Piety, Tamara R.,
"Scorched Earth: How the
Expansion of Civil For-
feiture Doctrine Has Laid
Waste to Due Process,"
45 U. Miami L.Rev. 939 (1991) 7

Smith, David B.,
PROSECUTION AND DEFENSE OF
FORFEITURE CASES (1992) 4, 6, 7

INTEREST OF *AMICI*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Hawaii is one of its statewide affiliates.

Earlier this Term, the ACLU submitted an amicus curiae brief arguing that the proportionality principles of the Eighth Amendment should apply to civil forfeiture. *Austin v. United States*, No. 92-6073 (argued April 20, 1993). In this case, we support Good's claim that the absence of a pre-seizure hearing violates due process. As both cases demonstrate, the increasing use of civil forfeiture for punitive purposes poses a serious threat to the interests of the ACLU and its affiliates. Accordingly, we submit this brief as *amici curiae* to assist the Court in its deliberations.[2]

SUMMARY OF ARGUMENT

This case began when the government seized the home of James Daniel Good without notifying him in advance or giving him an opportunity for a hearing. The government exercised this authority pursuant to 21 U.S.C. §881, which provides for civil *in rem* forfeiture of real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a federal drug offense.

As this case illustrates, the broad interpretation of

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] This brief is limited to the due process questions presented by the petition for *certiorari*. It does not address the statute of limitations issue that is also before the Court. *See* Pet.Cert. at i.

civil *in rem* forfeiture advocated by the government has gone far beyond its historical roots. The contention that modern forfeiture law is nothing more than the continuation of an ancient and historically validated practice is, therefore, misleading. Forfeitures were originally limited to contraband or objects that had caused direct injury. Good's home fits into neither category. The notion that it is nonetheless subject to seizure is a recent invention that corresponds neither to history nor to our contemporary sense of constitutional values.

This Court has frequently held that due process requires an opportunity to be heard before one's property is seized, except in "extraordinary situations." *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972). That exception does not apply here. Any claim that time was of the essence is belied by the fact that the government waited four and one-half years before instituting these forfeiture proceedings. And, unlike a car or yacht, the government can hardly assert that Good's home was in danger of being moved before a hearing could be held.

Indeed, the government does not seriously dispute the need to engage in a due process analysis. Instead, it argues that Good received all the process that was due when the government obtained an *ex parte* warrant authorizing the seizure of his home. *Ex parte* procedures, however, do not meet the demands of due process in this context. The risk of erroneous deprivation is simply too great, especially when the property in question is a person's home. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). In addition, the warrant procedures of the Fourth Amendment were never designed to seize property, like Good's home, that is not contraband nor evidence nor an instrumentality of crime.

Finally, the seizure of Good's home under the circumstances of this case is clearly punitive, both in purpose and effect. Before punishing Good in this fashion, the government should be required to comply with the

procedural safeguards that normally attend a criminal proceeding. The value of those safeguards would be greatly diminished if they could be avoided by the simple expedient of labeling the forfeiture proceeding civil rather than criminal.

ARGUMENT

I. THE HISTORY OF FORFEITURE DOES NOT SUPPORT THE SEIZURE OF GOOD'S HOME WITHOUT A HEARING

"[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). In this case, therefore, consideration of what process Good is due prior to seizure of his home appropriately begins with an analysis of the history of forfeiture.

Courts seeking to justify the absence of due process protections for claimants in civil *in rem* forfeiture proceedings have traced the roots of modern civil *in rem* forfeiture to common law and early American forfeiture practices. Accordingly, many modern cases rejecting challenges to civil *in rem* forfeiture are premised on the notion that courts are not writing on a clean slate and are essentially tied to a historical notion of forfeiture. In fact, modern forfeiture has been expanded far beyond its historical roots. Thus, a proper reading of the history of forfeiture cannot justify denial of due process protections where, as here, the forfeiture is not remedial but punitive.

The legal fiction that civil forfeiture penalizes the guilty property, rather than the guilty property owner,

long ago outlived its usefulness as an analytic tool for constitutional decisionmaking. Its origins have been traced as far back as Biblical times,[3] and vestiges of the idea are found in ancient Greek and Roman Law,[4] but in the thousands of years that have passed since the fiction began, no nation has so expanded and so abused the fiction as the United States since the Civil War.[5] Ironically, the expansion of the fiction has not been based on moral or constitutional grounds, but has instead been justified as an historical remnant, "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921). *See also United States v. U.S. Coin & Currency*, 401 U.S. 715, 719-20 (1971)(commenting that, although the fiction is "remarkable," broad forfeiture laws are justified by centuries of history).

History alone, however, can neither explain nor justify the dramatic expansion of civil forfeiture during the last ten years as a punitive measure to confiscate and condemn property that was not contraband, vehicles that were not carrying contraband, and homes that were only tenuously connected to contraband. *See, e.g., One Blue*

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[3] *See* Jacob J. Finkelstein, "The Goring Ox: Some Historical Perspectives On Deodands, Forfeitures, Wrongful Death And The Western Notion Of Sovereignty," 46 Temp.L.Q. 169 (1973).

[4] Walter Woodburn Hyde, "The Prosecution And Punishment Of Animals And Lifeless Things In The Middle Ages And Modern Times," 64 U.Pa.L.Rev. 696 (1916).

[5] In England, for example, forfeiture statutes almost always require a criminal conviction and criminal procedures before property can be taken. Civil *in rem* forfeiture is very rare and always limited to property that is inherently dangerous or contrary to the public interest. *See* Sir Derek Hodgson, PROFITS OF CRIME AND THEIR RECOVERY (Heinemann, London 1984) 32, 94-98 (American forfeiture is justified by a misnomer, *i.e.* "civil" forfeiture is really penal); *see also* 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1992), ¶1.02 at 1-14 n.21 (Germany has a proportionality limitation).

1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759 (8th Cir. 1986)(allowing forfeiture of jeep used to transport individual found *not guilty* of any offense); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983)(allowing forfeiture of car used to transport person to drug deal that never took place); *United States v. Premises Known As 3639-2nd St., N.E.*, 869 F. 2d 1093, 1096 (8th Cir. 1989)(holding that using or intending to use real property as site for drug transaction will render it subject to forfeiture); *United States v. One Parcel of Real Estate Known As 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991)(upholding forfeiture of home based on homeowner's use of telephone to negotiate drug transaction).

Indeed, historical forfeiture was never so broad as it is today. Up until the Civil War, every nation in every era that relied on the fiction of the guilty property to justify forfeiture used it only to confiscate contraband or the objects that had themselves *directly* participated in a crime.[6] For example, the early Greeks and Romans used the fiction only to confiscate objects that had actually taken a human life.[7] The Biblical reference to the "goring ox," cited in *Goldsmith-Grant Co.*, 254 U.S. at 511, only permitted the taking of an ox that had gored a man to death.[8] The English concept of the deodand, which is so heavily relied upon to justify modern forfeiture, only applied to "objects . . . which [were] the *direct* agents of a man's death."[9] Finkelstein, *supra* note 3, at 185 (em-

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[6] *See generally* James R. Maxeiner, "Bane Of American Forfeiture Law -- Banished At Last?", 62 Cornell L.Rev. 768 (1977).

[7] Hyde, *supra* note 4, at 696-701.

[8] Hyde, *supra* note 4, at 700.

[9] As Blackstone explained, if a man was killed by climbing on a wagon wheel, only the wheel was deodand, not the rest of the wagon. Hyde, *supra* note 4, at 727.

phasis added).[10]

To be sure, forfeiture expanded over the years and, not surprisingly, the expansions typically occurred during times of substantial change in society. The first great expansion occurred in England with the passing of the Navigation Acts of the mid-seventeenth century. Until then, forfeiture was generally limited to goods on which duties had not been paid. The Navigation Acts abolished those limitations. Maxeiner, *supra* note 6, at 774; 1 Smith, *supra* note 5, ¶2.03 at 2-8 (1992). For the sake of national seapower, the Navigation Acts required that commodities be shipped in English-built, owned and crewed vessels and the penalty for violation was a forfeiture of both the ship and the cargo. By permitting the forfeiture of the ship and the cargo and by imposing a form of strict liability on the ship owner, the Navigation Acts went further than any forfeiture statute ever enacted in England up to that time. Maxeiner, *supra* note 6, at 774. 1 Smith, *supra* note 5, ¶2.03 at 2-8.[11]

Early American forfeiture carried over much of the English tradition, including its limitations. Like its English counterpart, *in rem* forfeiture was purely remedi-

[10] Ironically, the British never relied on the deodand to justify their forfeiture laws. They recognized that "goods as goods, cannot offend . . . but [only] men whose goods they are." Maxeiner, *supra* note 6, at 771 (quoting *Mitchell qui tam v. Torup*, Parker 227, 145 Eng.Rep. 764 (Ex. 1766)). Deodands were eventually abolished in England in 1846. Finkelstein, *supra* note 3, at 170.

[11] Yet, despite their expansiveness for the time, the Navigation Acts pale in comparison to modern American forfeiture. The forfeiture of the ship and the cargo was roughly equivalent to the early American customs acts, where seemingly harmless goods were made contraband. A violation of the Acts required the shipping of cargo in an illegally built, owned or crewed vessel. The vessels and the cargo were not merely tools of the crime, but were both elements of the offense. They were the very evil that the statute sought to protect, and still, the Acts were considered expansive.

al. It was originally used to seize contraband and enforce customs laws, and only slowly expanded to include the confiscation of objects that were not themselves contraband but which were directly used in crime, 1 Smith, *supra* note 5, ¶2.03, at 2-9 (1992), such as vessels involved in piracy, slave-running and smuggling. *Id.* at ¶1.02 at 1-15, n.23. *See also* Tamara R. Piety, "Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process," 45 U. Miami L.Rev. 939-40 (1991). Of crucial importance, however, forfeiture remained limited to property directly used in crime. For instance, in 1844 this Court found that under the law of nations, a pirate ship could be forfeited as the only way to insure "indemnity to the injured party." Yet its cargo had to be returned to its owner. The ship was "guilty," while the cargo was not. *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 235-37 (1844).

It was not until the Civil War that forfeiture laws began to expand well beyond their historical basis. Under the Confiscation Act of 1861, 12 Stat. 589 (the "Act"), Congress authorized the condemnation of property owned by Southern rebels accused of treason despite the negligible connection between the property and the crime, and the clear *punitive* nature of the sanction. The Act was met with considerable protest, with one Senator calling it "hocus-pocus"[12] and one state court predicting that "[t]hese [*in rem*] proceedings may to-day be the engines of punishment to the rebels, but, in the future, they may be the instruments of oppression, injustice and tyranny . . . ."[13] Nevertheless, the Act was upheld by the Supreme Court as a war powers measure. *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871). In a scath-

[12] Maxeiner, *supra* note 6, at 786 (quoting Cong. Globe, 37th Cong., 2d Sess. 1574, 1809 (1862)(remarks of Senator Collamer).

[13] Maxeiner, *supra* note 6, at 787 (quoting *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 426 (1863)).

ing dissent, Justice Field warned that the Act "works a complete revolution in . . . criminal jurisprudence." *Id.* at 323 (Field, J., dissenting).[14]

Since that time, courts have ignored the war powers justification for the Confiscation Act and have steadily expanded the concept of forfeiture, catching more and more in the forfeiture net while claiming to be bound by historical precedent. Lawrence A. Kasten, Note, "Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation," 60 Geo. Wash.L.Rev. 194, 202 (1991); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878)(permitting the seizure of a distillery and other property "connected with" the distillery based on the "guilt" of the property in violating the revenue laws).[15]

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[14] It is interesting to note what one supporter of the Act had to say about the guilty property fiction:

> This being the law, there is really no foundation whatsoever for the doctrine of an offending thing. To say that an inanimate thing incapable of volition or action, is an offender against the law, is a mere rhetorical flourish . . . . It is bad in every point of view, a poor specimen of legal metaphor, of strained fancy and foggy metaphysics. Indeed, it is but a legal fiction, which, like the "Will-o-the-wisp" or Jack with his lantern, the more it is admired and the further it is pursued, the greater the dangers and delusions to which it subjects, to say nothing of the inextricable and perplexing quagmires into which it leads its charmed pursuers.
>
> How idle and visionary then to talk about an offending thing! Property commits no crimes.

L. Madison Day, The Constitutionality And Legality of Confiscations In Fee, Under Act of July 17, 1862, at 65 (New Orleans 1870).

[15] In fact, before the Confiscation Acts there had always existed *in personam* forfeiture prosecutions which were penal in nature and required a suit against the person, not the property. But once the Court had permitted *in rem* suits to occur against property not directly con-
(continued...)

The next great expansion in United States' forfeiture law occurred during prohibition. Most significantly, in *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, the Court permitted the forfeiture of a car transporting liquor in violation of the revenue laws. From that point on, courts have relied on *Goldsmith*, the deodand, and the guilty property fiction to justify virtually any kind of forfeiture. *See* Maxeiner, *supra* note 6, at 792. As this Court prophetically observed in *Goldsmith*:

> [i]t is said that a Pullman sleeper can be forfeited if a bottle of illicit liquor be taken upon it by a passenger, and that an ocean steamer can be condemned to confiscation if a package of like liquor be innocently received and transported by it . . . . *[The act] has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made it will be time enough to pronounce upon it.*

254 U.S. at 512 (emphasis added).

The forfeiture laws have now reached the proportions foreshadowed in *Goldsmith*. These laws are the cancerous growths of an historical anachronism, thrust into a modern age without modern procedural protections, and they cry out for limitation.

Today the government uses *in rem* civil forfeiture statutes not just to confiscate illegal property or property specifically designed to perpetrate drug use and distribution, but also to confiscate property, like Good's home, which was neither designed to promote the drug trade nor instrumental in a drug transaction. The legal fic-

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[15] (...continued)
nected with the wrongdoing, and sanctioned *in rem* forfeiture that was essentially criminal in nature, *in personam* suits disappeared, and modern forfeiture was born. Maxeiner, *supra* note 6, at 788.

tions used to justify these forfeitures have no place in a nation with a long tradition of taking property and due process rights seriously. Where, as here, civil *in rem* forfeiture is no longer grounded in its original remedial justification, the government can no longer rely on the "guilty property" fiction to obscure the punitive impact of forfeiture on individuals like Good.

II. SEIZURE OF GOOD'S HOME WITHOUT NOTICE AND A HEARING VIOLATED HIS RIGHT TO DUE PROCESS

A. Under The Fifth Amendment, Good Is Entitled To Notice And A Hearing Prior To Seizure Of His Home

The Fifth Amendment to the United States Constitution guarantees that no person shall "be deprived of life, liberty, or property, without due process of law." As consistently construed by this Court, due process requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)(emphasis in original)(footnotes omitted).

In *Fuentes v. Shevin*, 407 U.S. at 90, this Court made clear that such "extraordinary situations" must be "truly unusual."

> Only in a few limited situations has this Court allowed outright seizure without opportunity for prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Id. at 90-91.

Here, there was no "special need for very prompt action" to justify the government's seizure of Good's home without the opportunity for a prior hearing. The events giving rise to the forfeiture of Good's home took place more than four and one-half years prior to the seizure. The government has not asserted that the seizure was necessary to thwart ongoing drug activity. The government's assertion that pre-seizure notice and hearing would jeopardize the security of the property is refuted by two simple facts: (1) Good was not living in the home (or even in the country) at the time of the seizure; and (2) the government allowed Good's tenants to continue occupying the home after the seizure. Accordingly, under *Fuentes*, Good was clearly entitled to a pre-seizure hearing. *United States v. Premises and Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1265 (2d Cir. 1989) (holding, in proceeding for drug-related forfeiture, that seizure of land without notice to homeowner and opportunity for adversary hearing violated due process).

Good's entitlement to a pre-seizure hearing is equally clear under the familiar balancing test of *Mathews v. Eldridge*, 424 U.S. 319, which determines the ingredients of due process in any given situation by weighing the public and private interests involved and the likelihood that error can be avoided through additional procedural safeguards.

Good's interest in maintaining control over his home is obvious. Indeed, this Court has consistently recog-

nized that an individual's interest in his home is entitled to greater constitutional protection than any other type of property. *See, e.g., United States v. Karo*, 468 U.S. 705, 714 (1984)("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable"); *United States v. Reed*, 572 F.2d 412, 422 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978)("[O]ne's reasonable expectation of privacy in the home is entitled to unique sensitivity from federal courts"). The fact that Good was temporarily in Nicaragua at the time of the seizure of his home does not diminish its significance to him as a place entitled to special due process protection. Good's continuing attachment to his house as a home is amply demonstrated by evidence in the record that he continued to store many of his possessions there and stayed there whenever he returned to Hawaii.

The risk of erroneous deprivation absent a pre-seizure hearing has long been acknowledged by this Court:

> [W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Fuentes v. Shevin, 407 U.S. at 81 (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951)(Frankfurter, J., concurring). Accordingly, "[i]n

almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

Finally, the government in this case had no legitimate interest in seizing Good's home without a hearing. The court below correctly determined that, given the immobility of Good's home and the government's four-and-one-half-year delay in instituting the seizure, there was no need for prompt action in this case. By contrast, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court was clearly concerned that a pre-seizure hearing might give the yacht owner time to remove his yacht from the jurisdiction. That concern is entirely absent from this record.

B. The Fourth Amendment Does Not Eviscerate The Fifth Amendment

Notwithstanding the government's argument that "[c]ompliance with the standards and procedures prescribed by the Fourth Amendment constitutes all the 'process' that is 'due' under the Fifth Amendment," Brief for the United States at 10, the Fourth Amendment does not displace or eviscerate the protections guaranteed to property owners under the Fifth Amendment. In *Soldal v. Cook County*, 506 U.S. __, 113 S.Ct. 538, 548 (1992), this Court recently declared:

> Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's dominant character. Rather, we examine each constitutional provision in turn.

Where, as here, the Fifth Amendment requires addi-

tional procedural protections, the government cannot evade its obligations to provide those protections by invoking the Fourth Amendment. Likewise, the government cannot rely on the *ex parte* procedures of the Fourth Amendment to satisfy the demands of due process triggered by the government's effort to forfeit Good's home.

1. The *Ex Parte* Procedures Of The Fourth Amendment Do Not Satisfy Due Process In The Civil Forfeiture Context

The fallacy of the government's argument that the Fourth Amendment trumps the Fifth Amendment in "civil" forfeiture cases is made even clearer by this Court's recognition that the Fourth Amendment is specifically tailored for the "criminal justice system." *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975). Ironically, the government includes in its brief a quote from *Gerstein* which explains the specific applicability of the Fourth Amendment to the criminal context:

> The Fourth Amendment was tailored explicitly for the *criminal* justice system, and its balance between individual and public interests has always been thought to define the "process that is due" for seizures of persons or property in *criminal* cases, including the detention of suspects pending trial.

Id. (emphasis added).

The government's argument that, in a civil *in rem* forfeiture proceeding, "[t]he defendant property therefore at least should be subject to seizure in the same manner as the defendant individual in a criminal prosecution," overlooks the fact that in a criminal prosecution, "the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those

accused of criminal conduct." *Id.* (emphasis in original). In the criminal setting, the Due Process Clause of the Fifth Amendment requires substantial procedural protections in addition to those mandated by the Fourth Amendment. These procedural protections are denied to defendants and claimants in civil *in rem* forfeiture actions. While minimal process may be appropriate during the seizure stage in the criminal setting in light of these additional safeguards, it is not appropriate during the seizure stage of *in rem* forfeiture, which has virtually no additional safeguards. The Fourth Amendment was adopted specifically for the criminal justice system, and has been applied in the civil context only as a means of *extending* to litigants due process protections that might not otherwise be available in a civil case. *See, e.g.*, *Soldal v. Cook County*, 113 S.Ct. 538; *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). It has never been used as a limitation on Fifth Amendment rights.

2. The Fourth Amendment Is Not Applicable To Seizures Of Real Property For Civil Forfeiture

Not only has the Fourth Amendment never been used as a limitation on Fifth Amendment rights, it has also never been used to seize real property with only tenuous connections to an underlying crime.

Modern search and seizure law permits the seizure of four types of property: (1) fruits of a crime, *i.e.*, stolen goods; (2) contraband; (3) evidence of a crime; and (4) objects used as a means of committing a crime. Fed.R.Crim.P. 41(b); *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 309 (1967). In seeking to apply the Fourth Amendment to the seizure of Good's home, the government ignores these limitations and instead tries to create a new category of permissible seizures that would allow the seizure of virtually any property, no

matter how tangentially related to criminal activity.[16]

The history of searches and seizures makes this danger all the more clear. Early British common law only permitted the search and seizure of stolen goods. John Kaplan, "Search and Seizure: A No Man's Land In The Criminal Law," 49 Cal.L.Rev. 474, 475 (1961). Eventually, that category was expanded to include the seizure of all contraband, *i.e.*, any good that a citizen could not lawfully possess. *United States v. Parcel of Land, Bldgs., Appurtenances & Improv.*, 507 U.S. ___, 113 S.Ct. 1126, 1133 n.15 (1993)(hereinafter "*Buena Vista*").

United States' law was as strict as England's, so that by the start of the twentieth century the government was still only permitted to seize articles that were either stolen or contraband. *See, e.g., Boyd v. United States*, 116 U.S. 616 (1886). The law was expanded somewhat in the early 1900's to include articles used as the means or instrumentality of a crime. Still, even that expansion was strictly limited to items that were directly involved in the crime, *i.e.*, murder weapons, gambling paraphernalia, etc. *Buena Vista*, 113 S.Ct. at 1133 (explaining that the "[g]overnment had power to seize only property that 'the private citizen was not permitted to possess'")(citations omitted); Kaplan, *supra* p.16, at 477; *Adams v. New York*, 192 U.S. 585, 598 (1904).

After this Court decided in *Gouled v. United States*, 255 U.S. 298 (1921), that the Fourth Amendment did not permit seizures of "mere evidence," the notion of "instrumentalities" began to expand into articles more akin to

[16] As Justice Frankfurter said over forty-five years ago: "[S]light extensions from case to case gradually attain a considerable momentum from 'judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of legality but which, in reality, strike at the substance of the constitutional right.'" *Davis v. United States*, 328 U.S. 582, 610-11 (1946)(Frankfurter, J., dissenting)(partially quoting *Byars v. United States*, 273 U.S. 28, 33-34 (1927)).

evidence than instrumentalities, so that by the time the "mere evidence" rule was finally rejected in *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, the difference between instrumentalities and "mere evidence" was difficult to discern. *See* Comment, "Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason," 20 U.Chi.L.Rev. 319 (1953). Even with this expansion, throughout the twentieth century an "instrumentality" was still strictly limited to items that were the direct means of committing a crime (even though they could invariably be used as evidence). *See, e.g., Garske v. United States*, 1 F.2d 620, 622 (8th Cir. 1924). As this Court explained in *Warden, Maryland Penitentiary*, 387 U.S. at 307, an instrumentality by its very nature requires a "nexus" to the underlying crime.[17]

Under this traditional definition, Good's home could never be considered an instrumentality -- and thereby subject to a Fourth Amendment seizure -- since it is neither the direct means of committing a crime nor evidence of a crime. *See, e.g., United States v. Certain Real Property And Premises Known As 38 Whalers Cove Drive,*

[17] The limitations on the word "instrumentality" or "means" to commit a crime is made all the more clear by this Court's recent decision in *Smith v. United States*, __ U.S. __, 61 U.S.L.W. 4503 (June 1, 1993), which interpreted a statute that penalized a person for making "use" of a firearm "during and in relation to" a violent crime. The Court looked to the everyday meaning of the word "use" as meaning to "employ."

On the other hand, before an article can be seized under the Fourth Amendment it not only must be "used" in the crime (as defined by *Smith*), but it also must be used as a "means" of carrying out the crime. The difference between "used" in a crime and used as a "means" of committing a crime is made clear by both BLACK'S LAW DICTIONARY and by *United States v. Loft on 6th Floor of Building*, 182 F. Supp. 322, 324-25 (S.D.N.Y. 1960). In *Loft on 6th Floor of Building*, the Southern District of New York refused to allow the seizure of an article which was "used" in the crime, because it was not used as a "means" of carrying out the crime.

954 F.2d 29, 36-37 (2d Cir. 1992).[18]

This traditional understanding of the Fourth Amendment is perhaps best captured by the response of a federal district judge when asked to approve the seizure of an entire brewing plant almost seventy years ago. To allow such seizures, the court wrote,

> entirely misconceive(s) the nature and purpose of a warrant of search and seizure . . . [A warrant] cannot be used as a cloak for dispossessing a man of his real estate . . . .
>
> [because] some regard should be had to the degree of connection between any given piece of property and its illegal use . . . *I doubt very much whether the statute authorizes the government to seize the hay that feeds the horse that hauls the cart that carries the hops, et cetera.*

Mellet & Nichter Brewing Co. v. United States, 296 F. 765, 768-70 (E.D.Pa. 1923)(emphasis added). Those very same doubts are no less appropriate today.

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[18] In *Warden, Maryland Penitentiary*, 387 U.S. at 303, this Court, citing Kaplan, *supra* p.16 at 475, traced the history of "instrumentalities" to the "early notion that items used in crime were forfeited to the State." If this is the true origin of instrumentality seizures, it adds further support to the argument that the Fourth Amendment cannot apply to modern forfeiture. Under common law, the forfeiture of goods to the Crown was only permissible if connected to a conviction and not as a result of "civil" proceedings. *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827). Thus, seizures of instrumentalities must be limited to forfeitures connected to a criminal trial, *i.e.*, criminal forfeitures. In addition, the seizure of instrumentalities would be limited to the same extent as historical forfeiture, which, as explained above, only applied to objects "directly" used in crime and nothing else.

III. BECAUSE THE FORFEITURE OF GOOD'S HOME IS PUNITIVE IN BOTH PURPOSE AND EFFECT, DUE PROCESS DEMANDS THAT GOOD BE AFFORDED THE CONSTITUTIONAL PROTECTIONS TRADITIONALLY ASSOCIATED WITH THE IMPOSITION OF CRIMINAL SANCTIONS

Given the punitive nature of the seizure in this case, due process demands that Good be afforded the constitutional protections traditionally associated with the imposition of criminal sanctions. This is true regardless of the label that is put on the forfeiture.

The government argues that seizure of Good's home is a Fourth Amendment seizure akin to "arrest," but fails to adequately explain why the "arrest" is not followed by the traditional criminal safeguards constitutionally required to follow an arrest. If, as the government argues, the original seizure is an "arrest" and criminal in nature, then full criminal procedures must follow.

Regardless of whether the government's arrest analogy is apt, this Court has determined that criminal procedures are constitutionally required when a deprivation of property is punitive in nature. *See* pp.21-22, *supra*. Since forfeiture of Good's home is plainly punitive rather than remedial, the hearing to which Good is entitled prior to deprivation of his property must include criminal due process protections.

A. The Distinction Between Civil *In Rem* Forfeiture And Criminal *In Personam* Forfeiture

Good's home was seized and forfeited under 21 U.S.C. §881(a)(7), which provides for the civil *in rem* forfeiture of real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" federal drug offenses. 21 U.S.C. §881(b) provides that property subject to forfeiture

under this provision may be seized, without notice or a hearing, based on "probable cause" to believe that the property is forfeitable. The property, which is denominated the "defendant" in an *in rem* action, is presumed to be guilty until proven innocent. Once the government establishes probable cause to believe that the property is subject to forfeiture (which it may do based solely on hearsay), the property is forfeited unless the owner of the property proves by a preponderance of the evidence that the property is "innocent" or otherwise not subject to forfeiture.

By contrast, *in personam* criminal forfeiture statutes permit forfeiture of the same property, but require that defendants (who are people, not property) be afforded criminal due process protections. For example, 21 U.S.C. §853, like its civil counterpart §881, authorizes forfeiture of property "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" federal drug offenses. However, to forfeit Good's home under §853, the government would have been required to convict him of a federal drug offense at a criminal trial where he would have been presumed innocent, hearsay would not have been admissible, and the jury would have been required to find proof of guilt beyond a reasonable doubt. Moreover, the government would not have been able to seize Good's home prior to forfeiture under §853 unless there had been a judicial determination that some less intrusive procedure, such as the issuance of a protective order or the posting of a bond, would not be sufficient to assure the availability of the property for forfeiture.

A comparison of the two statutory schemes prompts a troubling question: Why should Good's rights vary so dramatically based solely upon whether the forfeiture proceeding in which his property is taken is denominated civil or criminal?

B. The Forfeiture Of Good's Home Is Punitive

Constitutional rights have never depended upon labels but rather upon the actual impact of government action on individuals. The "civil" label placed on §881 by Congress is not determinative of the nature of forfeitures pursuant to that section, since "civil proceedings may advance punishment as well as remedial goals." *United States v. Halper*, 490 U.S. 435, 448 (1989). "A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 448 (emphasis added).

Indeed, this Court has on numerous occasions recognized the essentially "criminal" nature of certain forfeiture proceedings denominated "civil." For example, in *Boyd v. United States*, 116 U.S. at 634, this Court acknowledged that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal" and therefore claimants are entitled to the Fifth Amendment protection against self-incrimination. The *Boyd* Court exposed the fallacy behind the *in rem* fiction:

> [W]here the owner of the property has been admitted as a claimant, we cannot see the force of this distinction [between a proceeding against the property and one against the person]; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property as well as against the goods; for it is breach of the laws which has to be proved to establish the forfeiture and it is his property which is sought to be forfeited . . . In the words of a great judge 'Goods, as goods, cannot offend, forfeit, unlade, pay duties, or

the like, but men whose goods they are.'

Id. at 637 (citations omitted).

Accordingly, the *Boyd* Court held:

> [A]lthough the owner of the goods sought to be forfeited *in rem* is not the nominal party, he is, nevertheless, the substantial party to the suit; he is certainly so after making claim and defence; and in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense.

Id. at 638.

Similarly, in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, the Court held that evidence obtained in violation of the Fourth Amendment may not be relied on to sustain a forfeiture because "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* at 700.

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), this Court articulated a series of factors that bear on the question of whether a sanction is deemed a punishment:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation

> to the alternative purpose assigned . . . .

Id. at 168-69. An analysis of each of these seven factors leads inexorably to conclusion that, despite its "civil" label, the forfeiture of Good's home under the circumstances of this case is indeed punishment.

First, forfeitures of property that was not directly used in committing a crime were historically regarded as penal. As explained above, under early British common law, property that was not directly used in committing a crime could only be forfeited in connection with a criminal conviction. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 682. Until the Civil War, forfeitures in the United States were either *in personam* or *in rem*. *In rem* forfeitures were strictly limited to property that was directly used in committing a crime. All other forfeitures were *in personam* and were considered penal. Since Good's home was not directly used in a committing a crime, its forfeiture historically would have been considered penal and required an *in personam* criminal proceeding. *See* Maxeiner, *supra* note 6, at 788.

Second, the express purpose of §881(a)(7) is the infliction of an affirmative disability, or punishment, on individuals connected with drug activity in order to deter them from engaging in criminal behavior. In enacting §881(a)(7), Congress indicated its view that "traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish" drug dealers and that, "if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made." Congress explicitly recognized that "the prospect of the forfeiture of the property would have been a major deterrent" to drug dealers. Senate Report on proposed Comprehensive Crime Control Act of 1984, S. Rep. No. 225, 98th Cong., 2d Sess. 195, *reprinted in* 1984

U.S. Code Cong & Admin. News 3182, 3374, 3378.

Third, although the government is not required to prove scienter to forfeit property under §881(a)(7), the statute expressly provides that "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

Fourth, although forfeiture under §881(a)(7) can occur without criminal charges ever being filed, property can be forfeited only if it facilitates the commission of a violation of federal drug laws "punishable by more than one year's imprisonment." Thus, §881(a)(7) applies to behavior that is already a crime and serves as an additional punishment for that behavior.

Fifth, as Congress envisioned, the forfeiture of Good's home was profoundly punitive in its effect on him, as it would be to any homeowner. There is no purpose other than punishment to which the forfeiture of Good's home may rationally be connected. The home was not in itself contraband and there is no allegation or indication in the record that the home was purchased with illegal drug profits. Consequently, the forfeiture of Good's home does not serve the traditional remedial goals of eliminating illegal substances from commerce or dispossessing criminals of their ill-gotten gains.

Sixth, by the time the United States seized and forfeited Good's home, more than four years had elapsed since Hawaii state authorities investigated, arrested, charged, and punished Good with imprisonment for drug trafficking. Good had completed his state sentence of incarceration and was complying with the conditions of his probation by leading a law-abiding life. Accordingly, state authorities had already accomplished the remedial goal of interdicting drug activity. There was no allegation or evidence that Good's home was being used to fa-

cilitate ongoing criminal activity at the time of the seizure and forfeiture, nor did the government have any reason to believe that the property would be so used in the future. Indeed, the federal government's four-and-a-half-year delay in seizing the property vitiates any claim that forfeiture of Good's home was necessary to prevent ongoing criminal activity.

Finally, the fact that the government has an economic interest in forfeiture to fund law enforcement activities does not make the forfeiture of Good's home any less punitive. The use of assets forfeited for punitive purposes to serve remedial goals does not change the fact that the underlying purpose and effect of the sanction is deterrence and retribution.

C. Given The Punitive Nature Of The Forfeiture Of His Home, Good Is Entitled To Procedural Protections Associated With The Imposition Of Criminal Sanctions

The government should not be permitted to use civil *in rem* forfeiture to deprive Good of his constitutional rights. Houses do not commit crimes, people do, and if the government wants to hold people accountable for those crimes by taking their property, it has the power to do so under the criminal forfeiture statutes. However, as those statutes reflect, the Constitution requires that certain fundamental procedural protections be observed. The government should not be permitted to eviscerate these constitutional protections by employing an untenable and archaic legal fiction.

Where, as here, "civil" forfeiture is punitive in purpose and effect, the government should be required to proceed under criminal forfeiture statutes that provide for the criminal due process protections required by the Constitution, including the presumption of innocence, the requirement of proof of guilt beyond a reasonable doubt, and the burden on the government to prove its case

based on competent (non-hearsay) evidence. *See, e.g., In re Winship*, 397 U.S. 358 (1970)(due process requires reasonable doubt standard in criminal cases); *Sullivan v. Louisiana*, __ U.S. __, 61 U.S.L.W. 4518 (June 1, 1993) (mistake in reasonable doubt instruction can never be harmless error).

This Court, however, need not go that far to agree with the Ninth Circuit that the absence of *any* pre-seizure hearing is irreconcilable with our fundamental notions of due process of law.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

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Dated: June 11, 1993